

## REMARKS

### A. Status of the Claims

Claims 1-24 were pending at the time of the Action. Claims 1-12 and 14 are canceled and claims 13, 15 and 16 are amended herein. Support for the amendments can be found, at least, in the claims as filed and page 6, lines 3-8; page 10, lines 22-28; page 11, lines 10-19; and page 40, lines 28-30. New claims 25-36 are also added herein. Support for the new claims can be found, at least, at page 11, lines 3-19; page 18, line 25 to page 19, line 5; page 22, lines 16-19; page 27, lines 27-31; page 38, lines 3-12 and lines 22-26; page 40, lines 28-30; page 57, lines 22-26; and page 58, lines 11-15. No new matter is added.

### B. Rejection Under 35 U.S.C. § 103

The Action rejects claims 13-24 under 35 U.S.C. § 103(a) as obvious over Kennedy *et al.* (*J. Econ. Entomol.* 1995, vol. 88, lines 454-460) in view of Turnblad *et al.* (U.S. Patent No. 5,849,320). In particular, it is asserted that that Kennedy *et al.* teaches seed blends and expression of “multiple toxins” and Turnblad *et al.* teaches seed treatments. The Action thus finds that it would have been obvious to combine the references to arrive at the invention. Applicants respectfully traverse.

The cited references, either in combination or alone, fail to teach or suggest the claimed subject matter. For instance, claim 13 currently recites:

A seed blend comprising refuge seeds and at least one variety of transgenic crop seeds for use in planting in a field, wherein said seed blend comprises a refuge seed and a first transgenic crop seed in a uniform mixture; wherein said mixture consists of from about 80% to about 99% first transgenic crop seed, wherein the first transgenic crop seed comprises a first insecticidal transgene and a second insecticidal transgene, and wherein said refuge seed does not contain the first and second insecticidal transgenes.

However, neither Kennedy *et al.* nor Turnblad *et al.* either alone or in combination disclose or suggest a mixture consisting of from about **80% to about 99% first transgenic crop seed**, wherein the first transgenic crop seed comprises **a first insecticidal transgene and a second insecticidal transgene** and refuge seed does not contain the insecticidal transgenes, as required by claim 13.

In particular, Kennedy *et al.* provides a general discussion about possible pest management techniques without any guidance as to which particular methods would be effective. Kennedy *et al.* is a purely conceptual paper that does not discuss any of the technical issues as to which strategies may or may not work and why. The reference merely discusses the constraints and incentives to implementation of *theoretical* management techniques in a speculative manner. In fact, the portion of the reference cited as teaching seed blends forms only a single sentence out of the 7 pages of this reference. At most, therefore, Kennedy makes a general mention of seed blends as one of a variety of techniques that have yet to be shown to actually work.

Most significantly, the Kennedy *et al.* reference predates a paper by Lambert *et al.* that tested seed blends and specifically found them to be impractical. In particular, Lambert *et al.* states that:

blends of *B.t.* and non-*B.t.* seed (85:15 and 75:25) sustained ***too much fruit damage and yield loss for the blended seed concept to be practical...*** Thus, it is likely that refugia will have to be accomplished through some ***means other than the blended seed strategy.***

Page 932, column 2, paragraph 4 (emphasis added). Therefore, one of skill in the art as of the priority date would understand from Lambert *et al.* that seed blends were not a practical pest management strategy. As this was based on experimental data, unlike the unsupported speculation cited in Kennedy, and this post-dated Kennedy, it would completely vitiate any alleged teaching of Kennedy *et al.* in regard to seed blends. The finding by Lambert that seed

blends cause “too much fruit damage and yield loss for the blended seed concept to be practical” simply cannot be ignored.

Turnblad *et al.* is not asserted to and does not cure these defects. Rather, Turnblad *et al.* is asserted to teach treating seeds with insecticides. In particular, although Turnblad *et al.* generally relates to coating seeds with insecticides, Turnblad *et al.* do not teach any seed blend.

In sum, the cited art, either in combination or alone, does not teach or suggest the claimed invention. The nonobviousness of the invention is further underscored by the teaching away of Lambert. The rejection is thus believed moot and withdrawal of the rejection is respectfully requested.

**C. Conclusion**

In light of the foregoing, Applicants submit that the case is in condition for allowance, and an early indication to that effect is earnestly solicited.

The examiner is invited to contact the undersigned (214) 259-0931 with any questions, comments or suggestions relating to the referenced patent application.

Respectfully submitted,

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